In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1384

HOWARD M. BALDWIN AND CLAIR C. WAGNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 407 F.2d 1286.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1969. A petition for rehearing was denied on April 11, 1969. The petition for a writ of

certiorari was filed on May 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the parol evidence rule, recognized as a matter of state contract law, requires the exclusion from a federal mail fraud prosecution of evidence of misrepresentations made to induce victims of the scheme to enter into superseding written agreements.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners (with others) were convicted of several counts of mail fraud (18 U.S.C. 1341) in connection with a scheme involving the sale and installation of swimming pools. They were each sentenced to concurrent three-year terms of imprisonment, the court directing that six months be served and the remainder suspended and spent on probation. The court of appeals affirmed (Pet. App. A).

The sufficiency of the evidence, set forth in detail in the opinion below, is not here challenged. It showed in summary that petitioners conceived the idea of forming several corporations for the purported purpose of selling swimming pools or franchises for swimming pools. They contacted numerous building contractors and others engaged in similar businesses who could install the pools. Various representations were made to these contractors to induce them to become "dealers" for the pools—*e.g.*, as summarized by the court below (Pet. App. A, 22), "that (1) the com-

pany had made arrangements to finance the purchasers of pools in the contractor's area under discussion; (2) that company-employed salesmen would do all the actual selling to prospects in the area; (3) that the companies would at their sole expense provide all the advertising for sales in the area; (4) that a sample pool would be installed at the expense of the company at a location selected by the contractor and the company as a device to promote sales, and that the contractor's cost of installing this pool would be reimbursed by the company upon completion of the pool; (5) that the company-employed technicians would help supervise the pool installations at the outset to assist the contractor; [and] (6) * * * that swimming pools had already been sold in the territory under discussion and that the dealer would receive a profit from these sales already made." The prospective dealer was then induced to make a deposit showing good faith, usually in the amount of about $3000. Thereafter the parties executed a written contract (set forth at Pet. App. B, 29-33), incorporating only a few of the details which had been previously discussed and containing the following final paragraph (Pet. App. B, 32):

> All previous contracts and understandings between the parties are hereby rendered null and void and of no effect. This writing contains the whole agreement between the parties and cannot be orally modified or changed.

The newly appointed "dealer" was then directed to notify the company when preparations for the installation of the sample pool were complete and the com-

ponents would be sent to him. When the contractor so advised the company, he would be asked for a deposit on the pool. If he forwarded this deposit, the pool would be shipped to him c.o.d. for additional charges of between $2000 and $3000. Some three hundred dealerships were sold during the period embraced by the charges in this case and in most instances the dealers were induced both to put up the good-faith deposit and to accept the c.o.d. shipment of the sample pool. No advertising program was ever conducted, no salesmen were sent to sell in the area covered, and no sales to the public were ever made. The contractors did not recover their good faith deposits or the c.o.d. charges. No technical assistance or engineering services were provided. The company in fact had no plan to finance purchases, as had been represented, nor did it have any advertising ready for distribution or any trained sales force. Nor had it installed the particular pools it claimed credit for. See Pet. App. A, 24, 27.

ARGUMENT

Petitioners' sole contention is that the federal mail fraud statute under which they were convicted was improperly applied because the oral misrepresentations would not have been admissible in a breach of contract suit in the Colorado state courts to supplement the terms of the written dealership agreements. The fact that the parol evidence rule would prevent such use of the underlying misrepresentations in a civil suit *by the victims* of the scheme does not, however, insulate petitioners from prosecution by the federal

government for mail fraud. As was said in *Gibson* v. *United States*, 268 F.2d 586, 589 (C.A.D.C.), quoting from a California decision, *People* v. *Chait*, 159 P. 2d 445, 454 (Cal. Dist. Ct. App.):

> The people prosecuting for a crime committed in relation to a contract are not parties to the contract and are not bound by it. They are at liberty in such a prosecution to show the true nature of the transaction.

The federal courts have uniformly held, in accordance with this principle, that Congress, in enacting the mail fraud statute, did not intend its scope to be circumscribed by the substantive laws of the various states with regard to the use of parol evidence to modify the terms of a contract. *Shale* v. *United States*, 388 F.2d 616, 618-619 (C.A. 5), certiorari denied, 393 U.S. 984; *Nickles* v. *United States*, 381 F.2d 258, 260 (C.A. 10).

The purpose underlying the mail fraud statute—to prevent the utilization of the mails in furtherance of a "scheme or artifice to defraud"—necessitates a uniform *federal* standard which, as stated in *Gibson*, *supra*, requires consideration of the entire transaction, including the misrepresentations made by a wrongdoer to induce his victim to enter into a written contract. Illustrative of this basic policy, manifestly within the constitutional power of Congress, are *Durland* v. *United States*, 161 U.S. 306, and *United States* v. *Comyns*, 248 U.S. 349, interpreting predecessor statutes to 18 U.S.C. 1341 as using the term "false pretenses" in a generic sense, without regard to state law, to reach not only the common law

crime of misrepresentation of an existing fact, but also the use of the mails to make a promise as to future conduct, not intended to be kept.[1]

Moreover, it should be noted, petitioners' assertion that Colorado law affords no remedy to the victims of this scheme seems far from indisputable. While the parol evidence rule would prevent the victims from using the oral misrepresentations, not incorporated in the written agreement, to support an action for breach of contract, a suit to void the contract and recover monies paid might well lie on a theory that there was fraud in the inducement. See *Timbers* v. *Mitchell*, 75 Colo. 430, 226 Pac. 149. In any event, state rules governing the enforceability of contracts cannot restrain the sweeping coverage of the federal statute designed to close the mails to anyone who would use them to execute "any scheme or artifice to defraud" or any attempt to obtain money or property "by means of false or fraudulent pretenses, representations, or promises * * *."

[1] The present mail fraud statute made no change in this regard. See *United States* v. *Painter*, 314 F.2d 939, 943 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

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